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TRANSNATIONAL RULES OF CIVIL PROCEDURE

FEASIBILITY STUDY

(prepared by Rolf Stürner, Professor of Law, University of Freiburg, Germany)

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The author wishes to express his gratitude to Dr. Alexander Bruns, LL.M., and Dr. Robert Schumacher, LL.M., for their co-operation.

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ON
TRANSNATIONAL RULES OF CIVIL PROCEDURE
TO BE DRAFTED BY
THE AMERICAN LAW INSTITUTE
AND UNIDROIT

A. THE PRESENT SITUATION OF TRANSNATIONAL CIVIL PROCEDURAL LAW

I. Significance of multilateral conventions

Present transnational civil procedural law endeavours to overcome the territorial limitations of national law by international conventions. The most important conventions for the practising international lawyer or judge are the Hague Service Convention 1965 and the Hague Convention on the Taking of Evidence Abroad 1970; a Hague Convention on international jurisdiction and recognition doesn't exist but is now being discussed again. Not without importance for the special field of family law is the Hague Convention on the recognition of support judgments 1973, which the USA have not ratified yet. For the European States the Brussels and Lugano Conventions provide common rules for international jurisdiction and recognition, the international service of process will be improved by a signed European Service Convention.

II. The practice of international litigation and its difficulties

The practice of international litigation has to cope with remarkable difficulties in fields where no international conventions apply; but the same is often true for matters, where there are such conventions. The author of this study is not only a professor for international civil procedural law; he has also known the practice of international litigation since nearly twenty years as a judge in state courts with special competence for recognition and enforcement of foreign judgments.

1. International jurisdiction and lis alibi pendens

The efficiency of an action is not seldom disturbed by the differences between the rules on personal and in rem jurisdiction and by a strong diversity of the rules regarding lis alibi pendens (lack of jurisdiction of the second court, parallel proceedings, antisuit injunctions, etc.). These discrepancies are a permanent source of conflict between the courts of different nations and often hinder the recognition and enforcement of foreign judgments.

2. Commencement of proceedings

The Hague Service Convention is not mandatory and exclusive in the opinion of most signatory countries; rather it specifies optional rules governing various possible ways of service abroad which could be used directly or by letter of request; many states have excluded certain forms of service provided by the convention. In the field of service abroad and of the Service Convention, the unification of law has made but poor progress, each country practices its own way of service abroad; moreover, there is a strong tendency towards fictitious domestic service to avoid service abroad. This practice generates many issues and difficulties

first in the proceedings of the forum and later in recognition procedures. As a consequence, the U.S.-Supreme Court, the European Court of Justice and many national constitutional courts had to cope with matters of service abroad.

3. The taking of evidence abroad

The Hague Convention on the Taking of Evidence Abroad 1970 is not mandatory and exclusive in the opinion of most signatories as well – the USA and their Supreme Court included. The signatory states seek to conduct the taking of evidence under their respective national rules and to avoid letters of request to a foreign authority under the Hague Convention where possible. The limits to taking evidence abroad under national rules and the problems of the violation of foreign sovereignty are still in dispute (e.g. depositions, production of documents or things to experts, medical examination on foreign territory). When the courts avail themselves of the mechanism of the Hague Evidence Convention, the appropriate latitude of discovery has become an issue of continous discussion between the United States with their broad approach and the rest of the world.

4. The active role of the judge and the lawyers

It is common knowledge that the Anglo-American adversary system lives on the activity of the parties and their attorneys: automatic discovery at the pre-trial stage, presentation of evidence at trial, parties' responsibility for legal grounds and legal authorities, parties' responsibility for settlements; continental European proceedings are dominated by judges with responsibility for fact-finding, law and settlements. This divergence results from profound differences between the legal cultures and is rooted in different conceptions of the citizen-state-relationship. Sometimes the adversary system is assigned to democracy and the continental European judge-dominated system to more authoritarian or – in modern times – social or even socialistic societies. In any case, this fundamental difference nurtures the somewhat prejudiced mutual impression that the proceedings sometimes want fairness.

There is still another, seldom discussed difference in the civil procedural practice: more than fifty percent of the continental proceedings are finished by judgment after final hearing or trial, whereas only five or six percent of Anglo-American disputes proceed to trial and final judgment. The judicial decision is a dominant purpose of civil procedure more in the continental European than in the Anglo-American concept of justice and its administration. The pretrial gives a good chance to settle a dispute by the activity of the lawyers and this case management seems to be better accepted in Anglo-American than in civil law countries.

The strong position of the judge in some continental European procedural cultures creates a very remarkable need for strict control and limitation of the judge's power; wide judicial discretion is a more exceptional phenomenon and judicial discretion will normally be provided in cautious dosages only (e.g. as to orders on sanctions, privileges) because of the intruding character of judicial measures and activities.

5. Professional judges and jury

The continental European and the present English civil procedure prefer professional judges; the hearings and the trial of the U.S. federal civil procedure are presided by professional judges, but in many cases laymen jurors decide by jury verdict being only instructed by a professional judge. The right to jury trial, which is an important guaranty of the federal

constitution and nearly every state constitution, has remarkable consequences for the structure of the procedure and the law of evidence; necessarily both focus on the presentation of all the material and evidence before laymen. For European continental critics this presentation sometimes appears to be more of a drama than a due process of law to find the truth and to give a fair judgment. The jury trial is the main source of mistrust and aversion of European defendants to the U.S.A. as a forum of international litigation, though jury verdicts and especially punitive damage awards are often overruled and reduced by the courts of appeals as "unreasonable". The poor opinion of the jury trial is increased by intra-American criticism and contrasts in a peculiar way with the great esteem in which the U.S.-American law is held as a mainspring of innovation and legal dynamism.

6. The structure of the proceedings

Nearly all national civil procedural laws know the division of proceedings into two stages. In the Anglo-American law family, the pre-trial with its discovery is used to gather all the facts and to find new evidence, to determine the crucial issues for trial, and in most cases to settle the dispute by a lawyers' agreement. The German pretrial stage prepares the final hearing and the taking of evidence at trial without any chance of fishing expeditions. The French and Italian civil procedure is divided into a stage of judicial fact finding and the final hearing as a stage of legal decision. The variety of the structures makes the mutual understanding of the foreign procedural law more difficult and produces misunderstandings when evidence is to be taken abroad.

7. Costs

Most civil procedural laws entitle the prevailing party to reimbursement of all necessary costs from the losing party; under the "American rule" each party has to bear its own costs and expenses. In the U.S., the widespread use of contingency fee arrangements may tend to increase the volume of punitive damage awards. This system encourages lawyers to initiate new actions; their fishing for clients with good cases is a competition for a market, whose permanent growth is in the interest of all lawyers and their representatives. The value of a case depends on the credit a lawyer is willing to give to it. There is nearly no risk for the claiming party, but the defendant has to pay his attorney without any chance to recover his expenses. Further burden may be placed upon the shoulders of the defendant by the practice of American lawyers to bill by the hour, which creates often incalculable and immense costs. Not only continental European lawyers consider this system of cost allocation unfair, because the aggressor bears no real risk and there is no proportionality of burden of costs and interest in litigation.

8. Recognition and enforcement

The enforcement of judgments in foreign countries is burdensome and needs much time. The refusal of recognition and enforcement sometimes is the consequence of fundamental differences of the substantive law (e.g. punitive or multiple damages) which cannot be eliminated by measures of procedural law, though special emphasis should be given to the fact that the jury system intensifies the effect of legal divergence especially in liability cases. Very often, errors and mistakes during the commencement of proceedings are important reasons for the denial of recognition: exorbitant jurisdiction rules, parallel proceedings with inconsistent judgments, but mostly inappropriate service abroad (even within the European Union). The execution itself, which is governed by the law of the executing country, may be delayed by

the exequatur proceedings, but once the exequatur is granted, the enforcement usually requires no more time than a normal national execution under the domestic law of the judgment rendering state with its sometimes very different effectiveness. Some national laws do not provide for the execution of judgments that order a party to perform or to refrain from a given act and instead prefer damage awards. Many debtors, though bound by a well reasoned judgment, instrumentalize the creditor's longer way to execution for delaying tactics.

9. Provisional measures

The rules governing interlocutory measures are designed very differently in the respective countries. Some countries, e.g. France, generously grant provisional measures resulting in satisfaction of the petitioner's claim, sometimes even without any security for the debtor (e.g. interim payments of contractual debts); the recognition and enforcement of those interim orders in foreign states appears to be difficult, uncertain and very limited even within the European Union. Common law countries provide for injunctions freezing the defendant's assets by restraining the defendant and non-parties from transfer or disposal ("Mareva injunction"); such injunctions are effective "*in personam*" and not "*in rem*" and the defendant or non-party who does not comply with the injunction will be held in contempt. The recognition of the extraterritorial effect of these injunctions on non-parties beyond the jurisdiction of the forum state is questionable and may be the exception. The most common procedures are an attachment or charging order or an interlocutory injunction to restrain the use or alienation of property; the application of these measures to foreign assets beyond "*in rem*" jurisdiction is, if at all, not well established. Mandatory or prohibitory injunctions effective only "in personam" are not readily enforceable in foreign countries that do not provide for contempt fines or "astreinte".

10. Third-party claims and non-parties

Whereas the countries of the German law family know multiparty actions and similar procedural institutions only to a very limited extent (joinder of parties [Streitgenossenschaft], intervention [Nebenintervention], vouching-in [Streitverkündung]), French law and countries influenced by French procedural law provide more generously for proceedings yielding an enforceable judgment against third parties (e.g. "demande en garantie"). The Anglo-American law family proceeds upon a very liberal policy regarding joinder of claims, interpleader relief and third-party practice. In international litigation, a liberal concept of third-party practice changes and extends the personal jurisdiction of the courts in a sometimes very surprising way; disputes in recognition proceedings are the consequence.

B. THE PURPOSES AND THE CHANCES OF SUCCESS OF TRANSNATIONAL RULES OF CIVIL PROCEDURE

I. Unification of laws or harmonization of laws?

Many problems of international litigation would be solved if the same rules of civil procedure were in place all over the world. However, not only would it be unrealistic to attempt to standardize procedural law world-wide, but it may not even be desirable to have only one uniform law of civil procedure. The competition between different systems of law is vital to the development of law world-wide. Moreover, the law of civil procedure is too deeply embedded in the legal culture to permit a world-wide unification. However, a clearly perceptible harmonization (as opposed to standardization) of procedural laws would facilitate

cross-border litigation substantially; it could save costs and may strengthen the confidence of parties in the enforcement of law world-wide. Furthermore, grounds for a court's refusal to enforce a foreign judgment would become more and more exceptional; also, it would be possible to simplify considerably the national procedures for the recognition of foreign judgments. Finally, cross-border law enforcement would become more effective.

II. Fundamental obstacles to the harmonization of procedural laws?

Firstly, it should be stressed in concurrence with the drafts of the American Law Institute that all important laws of civil procedure have certain basic categories in common: the right to access to justice, the principle of public trial, the right to a neutral judge and the right to be heard (which implies some basic elements of the adversary system or "principe du contradictoire"). Further common elements concern the right to give evidence and the rules of finality of judgments. It is often said that there are fundamental differences between the civil law system and the common law system which hinder a successful harmonization. This is, however, not the case (which is also the opinion of the American Law Institute's drafts). For example, the difference in structure between the reformed German procedure and the English procedure is but relative. Both English and German law provide for preliminary proceedings which are conducted mainly in writing and serve the purpose of preparing the taking of evidence at trial. At the preliminary stage, there is only one "preparatory" hearing if possible. As regards the pretrial stage, the differences between the modern German procedure and the Romanic systems are even greater in many respects. The "instruction proceedings" of French and Italian law with their series of hearing sessions aim at a full inquiry into the facts. They are hardly separated from the final hearing where questions of law are decided. In German procedure, the judge traditionally plays quite an active role. The same applies to modern French civil procedure. In Italian and in ordinary Spanish procedure, on the other hand, the judge is considerably less active. The English plans for reform of civil procedure, as expressed in the Woolf-Report, show that a more active role of the judge is not altogether incompatible with common law traditions.

Much stronger are the differences between U.S. civil procedure and the rest of the world: broad discovery, no cost-shifting (American rule), jury trial. While the U.S. rules on discovery and on costs seem to be open to compromise, the jury system is, for the time being, mandatory on constitutional grounds. The impact of jury participation on the structure of a trial should neither be underestimated nor overestimated. Even if there is a jury, the chair of the trial remains with the judge. If it was possible to strengthen the active role of this judge during the presentation of the evidence to the jury, the risk of manipulative conduct of attorneys – which is feared by Europeans – would diminish. The jury trial would then become more similar to a civil law trial with influential participation of lay judges, like proceedings in commercial matters where lay participation is very usual. It would be necessary here to explore in detail the elasticity of the U.S. constitutional framework. After all, the jury is not an absolutely insurmountable obstacle to the harmonization. Finally, it should be noted that not all proceedings in U.S. courts are jury proceedings. Where they are not, the possibilities of harmonization are better. In the long run, the effect of this harmonization may influence the reality of jury trials.

III. Convention or Model Code?

One conceivable way of harmonization would be a convention which provides a framework to be implemented by the contracting states. However, as far as civil procedural

law is concerned, the experience with the Hague conventions is not very encouraging. The contracting states tend to fear binding obligations and a loss of creative freedom. Such conventions are, therefore, quite often too broadly worded, or they are merely an optional collection of the existing national solutions. This is the shortfall of the Hague Service Convention and of the Hague Convention on the Taking of Evidence Abroad; in the present negotiations about the conclusion of a Convention on the Recognition of Judgments, important contracting states already refrain from prescribing a limited number of grounds for international jurisdiction, comparable, e.g., to the grounds named in the Brussels Judgment Convention.

A model code or model rules, which also seem to be in the mind of the ALI-draftsmen, have the advantage of definitely leaving each state its creative freedom. It is up to each state to decide whether it is convinced in full or in part of the model rules and whether and to what extent it is going to adopt these rules. In this respect, the Uncitral model code on arbitration has had very encouraging results.

IV. Scope of the model rules

1. Conceivable alternatives

Of course, the complete or only slightly modified adoption of all the model rules through the national legislators would always suit best the intentions of the draftsmen of a model code. Different options are conceivable: The legislator may decide that all the rules should apply to all kinds of civil proceedings, that they should only apply to "international civil proceedings" or that they should apply to certain types of international proceedings. Instead, the national legislator may also choose to adopt only some of the model rules or to leave the choice of the model rules to the parties to the litigation.

2. The preparatory works of the American Law Institute

The preparatory works of the American Law Institute reveal understandable difficulties on the question of scope of the model rules. The drafts are confined to international litigation and accordingly have to solve the difficult task of giving a definition of international proceedings. In a later draft, the applicability of the rules is reduced even further to international contractual disputes. The right of the parties to choose between the model rules and the "ordinary" national rules has also been the object of alternating considerations. Finally, certain specific proceedings are excluded (tax proceedings, certain claims against public authorities and statutory claims, family and inheritance matters, insolvency proceedings etc.). Again, it will be a complicated task to draw the exact borderline in each respective case.

3. Rejection of a too narrow scope of application

Of course, these considerations are warranted. However, if one assumes a model code, it will always be up to the national legislator to define in detail the exact scope of applicability of the rules. Only rarely will all the rules be adopted. It is, therefore, sufficient for the model rules to define their core scope of applicability, i.e., civil litigation of international or transnational character. A further reduction of the scope to contractual claims or contractual choice of the parties would appear less recommendable, since this would mean a limitation to the genuine area of international arbitration. Other important fields of litigation such as tort

litigation, anti-trust law, intellectual property law or statutory claims should not be excluded. Otherwise, in the view of important trading partners of the USA the model code might lose attraction.

4. Attraction of transnational rules of civil procedure – equality of the parties to the litigation

The limitation of the model rules to "transnational proceedings" – however this concept is defined – creates a special set of procedural rules next to the domestic procedure. The draftsmen rightly assume that the full or partial adoption of the rules in respect of transnational and domestic proceedings would be hard to achieve and could – if at all – only take place very slowly. The idea of special proceedings for certain types of cases is not new to national procedural laws – this is also pointed out by the drafts of the American Law Institute. The question remains, however, whether this idea is convincing; in particular, the introduction of special proceedings for transnational litigation contradicts the rule that the law should be applied regardless of the nationality of the parties. Why should, e.g., a foreign plaintiff in a European court have wider discovery at his disposal than a European plaintiff? Or why should the American plaintiff in the U.S.A. be limited in discovery, only because he is suing a Japanese defendant? Such differentiations can only be justified if the model rules offer some advantage to the parties. This advantage may and must consist of the fact that during the proceedings it is easier to get cross-border judicial assistance and that the recognition and enforcement of judgments is easier to achieve under the model rules than under the national rules of procedure.

5. Criteria of assessing former and future harmonization efforts

If the project of Transnational Rules of Civil Procedure is to be successful, certain criteria must be taken into account when assessing the work of the American Law Institute so far and the possible future cooperation with Unidroit as well. These criteria follow from what has been said above:

a) Facilitation of international litigation and recognition of the results

The model law must eliminate or at least minimize as many of the afore-mentioned obstacles to international litigation as possible. In this respect, it is wrong just to leave aside certain important questions. The reference to existing conventions is advisable only if these conventions operate satisfactorily. If need be, their applicability and operation has to be put in concrete terms.

b) Convergence and tolerance

The model law must result in a sufficient convergence of the different legal systems, especially between the U.S.A. and other Common Law and Civil Law Countries. The rules should tolerate important traditions of legal culture, since otherwise they have but poor prospects of adoption.

c) Broad scope of application

The model rules will only offer enough advantages if they apply broadly and to all fields of transnational litigation, if possible.

C. THE DRAFTS OF THE AMERICAN LAW INSTITUTE – ATTEMPT OF AN ASSESSMENT

I. Scope

The recent drafts of the American Law Institute define the scope of application of the Transnational Rules very narrowly. This means that the rules will loose much of their attraction to Europe, South America and East Asia, since important aspects of international litigation, especially as regards some aspects of U.S. law, will be excluded from the scope of the model rules. A joint working group could discuss this topic further. The group should bear in mind that Transnational Rules can be particularly important in those matters that are not normally subject to arbitration.

II. Constitution of the court

According to the drafts of the American Law Institute, the court consists of three professional judges and optionally two nonvoting experts. This resembles more the traditional continental European paradigm, although there has been a recent development towards a single judge. Moreover, the lay judges in European courts normally have full voting rights. The rules on the constitution of the court expressly yield to constitutional requirements which is, in fact, a "jury reservation". It is necessary to consider in greater detail the implications of the constitutional right to jury trial. Above all, it should be discussed, whether it is worthwhile to make rules on the constitution of the court while under the U.S. Constitution a jury trial is obligatory in federal court without the chance for a compromise and while the same is true in many states of the United States. At least, such rules may have a certain model function. The rules should provide for a reduction in the number of judges in smaller or less complicated cases.

III. Commencement of suit

The proposals on the commencement of suit clearly improve the present situation in that they solve the problem of translation of the statement of claim as well as of the summons to appear. In this respect, the rules are ahead of most international conventions. However, the reference to the "applicable international convention" raises many doubts and does not provide answers to numerous questions of practical importance. For example, it is left to the *lex fori* to draw the line between the service of documents abroad and the domestic service of documents. This will often lead to the non-application of the service convention. There is no rule on the consequences of irregularities of proceedings, e.g., lack of translation. The most important convention, i.e., the Hague Service Convention, knows many forms of service abroad, some of which are subject to reservation clauses of contracting states. There is no mention of the service by waiver and of the problems resulting from it. It is worth considering whether the model rules should not seize the opportunity to solve some of these problems and to regulate in greater detail how the conventions should be applied.

IV. International jurisdiction and lis alibi pendens

According to the notes on the drafts of the American Law Institute, the various national rules of international jurisdiction are – at least in the central questions – converging. The reserve of the drafts against providing their own rules of international jurisdiction may not least be due to the controversial discussions about the questions of jurisdiction at the Hague negotiations on a Recognition Convention. However, it is not advisable to waive from the

start any chance of reaching a common rule on international jurisdiction and of excluding expansive grounds for jurisdiction. The authors of the rules could wait for the results of the Hague negotiations and could take into account the experiences with the Brussels Judgments Convention and its reforms.

It is very important to make provisions for the consequences of *lis alibi pendens*. The solution to this problem may consist of a compromise between the European system (lack of jurisdiction of the court of the second suit) and the Anglo-American system (parallel suits): The second proceeding could be stayed with the option of reopening it again in case the first proceeding does not provide timely and satisfying relief. The regulation of *lis alibi pendens* would also presuppose an agreement on the question of when separate actions concern "the same subject matter".

V. Disclosure and the taking of evidence

The drafts of the American Law Institute attempt to strike a balance between the U.S. American concept of pretrial discovery followed by the taking of evidence at trial on the one hand and the European system on the other. They show good promise, but also leave many questions unanswered. In all, the American paradigm generally prevails.

1. Basically unrestricted access to all evidence

The drafts of the American Law Institute in principle grant a party access to all evidence of the other party and of third persons (written and oral testimony, documents and things, expert testimony, interrogation of parties etc.). The principle of unrestricted access corresponds to recent European developments. The restrictions of German law on the right to demand disclosure of evidence from the adversary or from third persons are rather exceptional. Another positive aspect of the rules is the tendency to provide for an "automatic" disclosure principally without court order as to documents and other forms of information and for a court order where the disclosure involves more substantial interferences such as medical examinations.

2. Scope of disclosure and of the taking of evidence – relevancy

The drafts seek to limit the scope of preliminary discovery by introducing the concept of "relevancy to the case". Evidence is considered to be "relevant", "when it tends to achieve rationally reliable knowledge of a fact in issue". The court has the authority to limit or bar disclosure which is too far-reaching and abusive. These rules, however, do not prevent "fishing expeditions" which are a matter of concern in Europe and elsewhere. In European civil procedure, the strict relevancy of disclosure and evidence to the action is controlled by the court from the very commencement of the suit. The parties are obliged to specifically and individually identify the objects of discovery or evidence. The drafts of the American Law Institute provide for the preliminary disclosure of "specifically defined categories of documents", for the disclosure of potential witnesses and any other "forms of information". A meaningful compromise may consist of a two-step-system. In a first step, discovery or evidence may only be demanded or taken as to facts which are "strictly relevant to the action"; the object of disclosure or evidence must be specifically identified by the party; in a second step, the court may order where this is justified that further disclosure should take place (reversion of the rule-exception-relationship of the American Law Institute's drafts). From the standpoint of the European legal systems and of other similar legal systems it is

sufficient that a party may demand disclosure only of specifically identified evidence; the American model, however, may have great advantages in exceptional cases where the European civil procedures break off the process of ascertaining the truth too early. In this regard, there is a pressing need for further discussion. The present, still very broad concept of disclosure hardly stands a good chance of success elsewhere in the world.

3. Examination of witnesses and parties – expert witnesses

The equation of witness examination and party examination reflects the Anglo-American paradigm as well, but eventually, it will probably be accepted by continental European systems, since the special rules for party statements (e.g. subsidiarity, party oath as irrebuttable presumption, etc.) are somewhat in retreat and are not representative of modern tendencies.

The mode of examination realizes the Anglo-American model and bears some resemblance to the cross-examination of the jury trial. Each party presents its own witnesses, and so does the court. This procedure is expressive of the idea that the parties prepare their witnesses and that it is up to the parties to comport with certain evidentiary rules during the examination. The continental European approach clearly differs from the Anglo-American model: the witness is to tell his story coherently, unaffected by the parties and the court; but then the court and the parties may pose questions. This model is likely to correspond better to the results of the psychological analysis of the examination process. The harshness of cross-examination is, *inter alia*, due to the preparation of the witness, which the other systems often do not consider serviceable to the revelation of the truth. In this respect, further exploration would be appropriate.

The elevated position of the court expert is a progress towards common conceptions. The provisions relating to the record of the evidence are a very successful synthesis of continental European and American rules ("summary record" of the court, "verbatim transcript" upon party demand).

4. Privileges

So far, the rules on privileges take pattern from the American model. In the U.S., the privilege most widely accepted and practically most significant is the attorney-client privilege, complemented by the work-product rule and the privilege for communication in settlement negotiations. The husband-wife privilege and privileges of other relatives as well as other professional privileges are disputed in the U.S.A. and subject to diverging state law (qualified privileges, privileges as absolute rights of substantive law, etc.). In Europe, except for England, privileges for all important professionals are recognized, and for relatives and spouses as well; like in the U.S.A., the business and trade-secrets are still in dispute.

The drafts of the American Law Institute emphasize the attorney-client privilege; privileges not explicitly enumerated in the draft rules shall be recognized in accordance with the forum law in principle. However, all privileges are at the court's discretion. Generally the party's waiver of the privilege shall be possible, the consequences for the testifying person remain unclear (duty to testify?), the consequences for the party refusing to waive the privilege too (drawing of adverse inferences?). The draft rules leave a very wide discretion with the courts and their harmonization effect is limited; the continental European idea of an absolute protection of privacy is being afforded but little consideration.

5. Taking of evidence abroad

The drafts of the American Law Institute leave open the question, whether and when the taking of evidence abroad should be admissible (investigations of experts, depositions) without leave of the foreign courts. E.g., in U.S. civil procedure depositions are not taken in court, rather only the attorneys are present. Therefore, American civil procedural law is prone to consider the taking of depositions or expert evidence abroad appropriate without assistance of foreign courts, unless immediate compulsion is necessary; in contrast, indirect compulsion, like e.g. a good faith control of a party who is the employer of a witness is permissible. In such cases, the European practice demands a letter of request under the Hague Convention, i.e., assistance of the foreign court. The ALI-Model Rules would be a propitious occasion to resolve this permanent conflict.

6. Rules of evidence, consideration of evidence, standard of proof

Anglo-American law knows manifold evidentiary rules, which in part are explicable by the presentation of the evidence before a jury (e.g., hearsay rule, restriction of character evidence to impeachment of witnesses, evidentiary rules against opinions of witnesses, etc.). The American Law Institute draft rules partly refer to such evidentiary rules, partly modify or exclude them. These draft evidentiary rules are not intelligible to an ordinarily qualified continental European lawyer, because he cannot exactly know their systemic origin. This point too supports the suggestion that the mode of witness examination could be worthy of further considerations.

Moreover, it would be generally recommendable to scrutinize the function of evidentiary rules. The general principle could be the free consideration of proof; whether or not additional exclusionary rules of evidence should continue to exist, is a difficult question, the answer to which depends on whether the function of the jury can be confined in favour of an increased influence of the judge.

The proposed adoption of the Anglo-American "preponderance of evidence" as standard of proof would be very difficult to handle for continental European oriented systems.

VI. The role of the court and of the parties

The draft of the American Law Institute partly relies on party activity (e.g., "automatic" disclosure), but allows additional court activity (e.g., additional disclosure, court witness, court expert etc.). This is a very sensible compromise. The coordination of party activity and activity of the judge requires a case management by the court, which the latest draft seeks to achieve. This case management by the court is mandatory in many European codes of civil procedure and it is also being discussed in the current English reform; its precise form could be an important object of further common efforts. In this context, one should discuss if and to what extent the burden of legal findings rests entirely with the court as it is common practice on the European continent ("*da mihi facta, dabo tibi ius*") or whether the parties need to present the legal grounds. Case management by the court without a clear legal basis is hardly conceivable. The American Law Institute drafts require that the parties state the legal grounds of claim and defence respectively; however, they remain silent as to the authority or duty of the judge to discuss issues of law and to make independent legal findings. The judge's authority to initiate or further settlement negotiations reflects the present state of common developments; in this regard, only England exercises strict restraint.

VII. Professional judges and jury

It has already been mentioned that harmonization between systems with professional judges and the jury system might be achieved by means of a more judge-dominated case management, like it is provided for in the drafts of the American Law Institute. One should think about whether further harmonization would be possible if special verdicts or general verdicts with interrogatories were made obligatory. A general verdict lacks any reasoning; jury instructions and their effect often remain unclear. A special verdict or a general verdict with interrogatories would make the decision-making process more transparent and strengthen the position of the professional judge.

VIII. Structure of proceedings and style of codification

Both the Model Rules' structure of proceedings and the style of codification strongly resemble the U.S. Federal Rules. Modern codes in the continental European tradition (Nouveau Code de procédure civile, South American Model Code) in their first parts strongly emphasize procedural principles (principes directeurs) and normally they are more detailed. In this respect, a sensible compromise presumably can be reached; the Anglo-American brevity has advantages too.

The procedural structure with its separation between pretrial and trial will find the acceptance of the procedural laws in the European tradition if an active role of the judge is ensured sufficiently even at the pretrial stage. Only on this condition will the continental European practice be in a position to cope with the procedural structure proposed in the draft rules.

The tendency towards brevity is also interrelated with the Anglo-American inclination to leave many details to judicial discretion, e.g., the exact prerequisites of a default judgment, the choice of sanctions (contempt fine or imprisonment, striking out, drawing adverse inferences, presumptions, etc.), third party practice etc. Such comprehensive authority of the court arouses mistrust with continental European jurists, so it is likely that it will not always be accepted in this form. Therefore, in part more detailed rules might be desirable.

IX. Costs

The draft of the American Law Institute recommends to discard the American rule. The meaning of the exception (good faith factual or legal disputation) remains somewhat unclear. A compromise between the different cost rules would be an indisputable progress. However, the reasonable extent of litigation costs (billing by the hour, specified lump sum attorney's fees depending on the amount in dispute) perhaps needs further clarification. The modified adoption of a payment into court (F.R.C.P. 67) is a very attractive suggestion.

X. Recognition and enforcement of foreign judgments

It has already been set out that Transnational Model Rules should not entirely do without provisions on international jurisdiction and the recognition of foreign judgments. Above all, it would be an incentive for the nation-states to adopt the Model Rules if this adoption would result in a reduction of the grounds for denial of recognition and in a simplified enforcement procedure.

The draft of the American Law Institute plans to intensify the effects of judgments by means of monetary penalties in case of non-compliance. In the European Union, similar innovations modelled on the French "astreinte" are presently under consideration. In this regard, there is common ground, although the precise shape of such coercive measures wants closer examination yet.

XI. Provisional measures

The American Law Institute draft rules provide but cautious harmonization of the strongly diverging rules on provisional remedies. The British Mareva injunction is mentioned as optional, the availability of (interim) satisfying measures (A II 9) is left open. The recognition of interlocutory measures abroad has not yet been a matter of course; in this respect, the draft rules are unclear. In this important area, a need for further consideration persists.

XII. Third party practice

The draft of the American Law Institute provides for generous third party practice allowing enforceable judgments against third persons. This discretionary inclusion of third persons is meant to create personal jurisdiction. The trend to reduce somewhat half-hearted procedural participation of third persons meets with common European tendencies. However, on its face the long arm statute on third party practice in the ALI draft appears to go beyond the present American scheme and therefore may not expect to fall on fertile ground in the rest of the world. This point wants intensive discussion.

D. SUMMARY AND RECOMMENDATIONS

I. Prospects of success of Transnational Rules

Harmonization of procedural law is useful and desirable and definitely has good prospects of success. It appears recommendable to devise Model Rules that may be adopted by nations and states, either in their entirety, in part, or modified. Orientation towards transnational procedure is sensible. The scope of the Model Rules should not be too narrow, particularly it should not be restricted to contractual obligations, since otherwise the Model Rules would lose attraction and, especially as compared to well established international arbitration, bring no significant progress. The divergence of the various national civil procedural cultures is not so great as to render sensible compromises impossible. The most serious difficulty lies in the incorporation of the U.S. jury trial. However, this problem may be surmountable if the American civil procedure is ready to accept a stronger position of the professional judge in jury proceedings.

II. The preparatory work of the American Law Institute

The drafts of the American Law Institute and its work group (Hazard/Taruffo) have done a very remarkable preparatory job in many areas. In some areas, they attempt to reach a compromise between the continental European model of civil procedure and American civil procedure (e.g., roles of court and parties, witness examination, court expert, record of evidence, cost rules, interlocutory measures). In other areas, American or Anglo-American concepts eventually prevail making but little concessions to the rest of the world (e.g., scope of discovery and taking of evidence, privileges, evidentiary rules, standard of proof, structure

of procedure, third party practice). Some important fields of conflict in transnational civil procedure are entirely left aside, although international conventions are not (yet) existent or have not brought about any significant improvement (service of process, international jurisdiction, lis alibi pendens, recognition of foreign judgments, taking of evidence abroad). The style of the Model Rules resembles more the U.S. Federal Rules or the English Supreme Court Rules than continental European codifications (Continental Europe, South America, Japan and East Asia, Russia, in future possibly China).

This stock-taking is not meant to be a conclusive assessment. Each system has advantages and weaknesses as well. It may be quite a practical course of action to exclude certain matters. However, Model Rules will be successful only if their contents and style are acceptable to as many different nations as possible and if their adoption sufficiently contributes to the solution of disputed problems. In this respect, further efforts to reach a reasonable compromise are necessary and sensible. The draft of the American Law Institute is an outstanding starting point and an excellent impetus to further efforts.

III. Future course of action

Unidroit should accept the proposal of the American Law Institute and elaborate Transnational Model Rules in a joint project. A common work group would be necessary. This panel should fairly represent the important procedural cultures. The members of the panel ought to be proficient proceduralists, scholars and practitioners as well, with adequate knowledge of foreign civil procedural law. Unidroit and the American Law Institute could agree upon parity as to the appointment of members. It may appear sensible to take into account the experiences with international arbitration as well as the efforts at harmonization in the European Union and South America.

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